UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

RICHARD LAWSON EXCAVATING, INC.,

and

Cases 6-CA-33928 6-CA-33929

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 66, 66A, B, C, D, O & R, AFL-CIO

Suzanne S. Donsky, Esq., for the General Counsel. Phillip J. Binotto Jr. and Thomas C. Gricks III, Esqs., of Cannonsburg, Pennsylvania, for the Respondent. Joshua M. Bloom, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on March 15–17, 2004. A charge was filed August 8, 2003, 1 and an amended charge was filed November 20. The complaint for Case 6—CA—33928, issued on November 21, alleges the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by permanently laying off Michael Gyrna on August 6, 2003, and thereafter refusing to employ him, (1) because of his activities on behalf of the International Union of Operating Engineers, Local Union No. 66, 66A, B, C, D, O & R, AFL-CIO (the Union) and (2) in order to discourage its other employees from engaging in such activities. The Respondent answered the complaint on December 5 and essentially denied the material allegations. On January 15, the Regional Director issued a consolidated order, consolidated amended complaint, and notice of hearing in Case 6-CA-33790, further alleging that, on or about November 19, the Respondent's attorney, Philip J. Binotto, Esq., acting as an agent, violated Section 8(a)(1) by threatening to file criminal charges against the Union and its agents in retaliation for the Union having filed an unfair labor practice charge on behalf of Gyrna. The Respondent filed an amended answer to the consolidated amended complaint and essentially denied the material allegations, including the proper identity of the Respondent. On February 25, the Regional Director issued yet another consolidation order, a second amended complaint in Cases 6-CA-33586, 6-CA-33790, 6-CA-33928, and 6-CA-33929, and notice of hearing in Cases 6-CA-33928 and 6-CA-33929. Essentially, the second amended complaint changed the name of the Respondent to "Lawson Excavating, Inc. or Richard Lawson Excavating, Inc." On March 10, the Respondent answered the second amended complaint and again denied the material allegations.

At the hearing, the parties were afforded a full opportunity to call and examine witnesses, present oral and written evidence, argue orally on the record, and file posthearing briefs. During the hearing, the General Counsel and the Respondent stipulated to several disputed allegations, including the proper identity of the Respondent as "Richard Lawson"

¹ All dates are in 2003 unless otherwise indicated.

Excavating, Inc.," jurisdictional facts, commerce conclusions, labor organization status, and supervisory status of certain individuals. Consequently, the parties stipulated to amend the consolidated amended complaint to reflect the correct name.² Furthermore, on the motion of the General Counsel and over the objection of the Respondent, the consolidated amended complaint was further amended during the trial to add an allegation that Raymond Kirich interrogated the Respondent's employees about their union activities in violation of Section 8(a)(1).³ On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

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Findings of Fact

I. Jurisdiction

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The Respondent, a Pennsylvania corporation, with its main office in Finleyville, is principally engaged in commercial excavation. During 2003, the Respondent purchased goods and supplies, valued in excess of \$50,000, that were obtained from employers located outside Pennsylvania and shipped directly to the Respondent's Pennsylvania facilities and worksites. Within that same period, the Respondent also provided services valued in excess of \$50,000 directly to employers at locations outside the commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. The Respondent's Operations

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The Respondent is primarily a nonunion excavation subcontractor. It has approximately 60 employees. Richard Lawson (Lawson), the Respondent's president and owner, generally works in the Finleyville office. He is solely responsible for the hiring, discharge, suspension, and discipline of employees. The Respondent's business falls into two categories. The first part, commonly referred to as the "dirt side" of the business, consists of excavation, sewer installation, and paving work on commercial and residential site development projects. The second part of the business is the management of fly ash and related waste at the Respondent's LaBelle, Pennsylvania site. Matt Canastrale, Inc. (Canastrale) owns the facility. It is located on approximately 1700 to 1800 acres of land and situated on the banks of the Monongahela River in Fayette County. As of August 2003, the ash was transported by barge from three power plants—Hatfield, Mitchell and Reliant—to two docks at the LaBelle facility. ⁵

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² The stipulation also included withdrawal of the Union's charges in Cases 6–CA–33586 and 6–CA–33790 against Lawson Excavating, Inc. Tr. 698. However, it did not include an admission by the Respondent as to the alleged agency status of either Raymond Kirich or Binotto. Tr. 17–20.

³ The General Counsel based its motion on the trial testimony of Douglas Arison that Kirich interrogated him about the Union's campaign on August 6. The Respondent opposed the motion on the ground that the amended claim was not related to the original claim, was late, and, therefore, barred by the applicable statute of limitations at Sec. 10(b) of the Act. Tr. 698–705.

⁴ The Respondent concedes that Lawson "is a supervisor for purposes of the Act. R. Br. at 50 5; Tr. 619–620.

⁵ Prior to March 2003, Canastrale provided the Respondent with barge deliveries from the Hatfield and Mitchell plants. In or around March, Canastrale obtained the contract for the Reliant

The Respondent, a subcontractor for Canastrale, offloads the material onto dump trucks with an excavator. Employees then transport the material approximately 2-1/2 miles up a hill and dump it into a landfill. At the landfill, a bulldozer operator spreads the ash and slopes the grades.

The Respondent's LaBelle facility operations include an office trailer, garage, loading docks, parking lot, and several dumps. The facility entrance is approximately 150 feet from the main road. Two signs at the entrance gate permit access to "only authorized vehicles" and direct visitors to sign in at the office. Employees park their vehicles just inside the gate to the right. Approximately 250 feet from the gate is a vehicle service garage. The office trailer is located near the river and approximately three-quarters of a mile from the gate.⁶

The Respondent employs approximately 12 persons at the LaBelle facility and does not maintain a seniority policy. The employees include truckdrivers, equipment operators, mechanics, and laborers. All report to Kirich, the Respondent's only supervisor at LaBelle for the past 4 years. He interviews all job applicants and submits a recommendation to Lawson for all hiring at that site. Kirich does not have the authority to hire, discharge, or suspend employees.

The regular hours of operation at the LaBelle site are 7 a.m. to 3 p.m., with no lunch period. Each employee records daily tasks on a form referred to as a "daily log" sheet. Employees submit daily log sheets to Kirich at the end of the day or the following morning. He initials each sheet. The employees work overtime on some occasions; on other occasions, they are sent home early. Pursuant to the Respondent's custom and practice, employees sent home early do not receive pay for the balance of the day.⁹ At the conclusion of each shift, Kirich gives employees their assignments for the following workday. These tasks include truck driving, barge offloading, and clearing the dump for additional space.

Prior to August 6, the Respondent upgraded equipment and hired additional employees in anticipation of increased ash deliveries from the Reliant plant.¹⁰ However, deliveries from the power plants fluctuate frequently.¹¹ Typically, business increases during summer and winter months—periods when power plants produce more electricity. Significantly, the Respondent never laid off employees at the LaBelle plant during these periods of fluctuation.¹²

Business fluctuations at the LaBelle facility have resulted in understaffing or overstaffing from day to day or week to week.¹³ The Respondent responded to such conditions by reassigning employees to "make work"¹⁴ or work at other locations, hiring new employees,

plant deliveries and awarded that work to the Respondent. Tr. 363-364, 606-619; R. Exh. 22.

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8 Tr. 19–20, 426–428, 466.

¹⁰ Tr. 22, 375; R. Exh. 17.

¹¹ Tr. 525, 543, 599–601, 722.

¹³ R. Exh. 24.

⁶ Tr. 362–363; R. Exh. 30.

⁷ Tr. 396.

⁹ Kirich conceded this practice, while Lawson initially denied it. Tr. 438, 444. Lawson, whom I did not find credible regarding the events and circumstances leading up to August 6, changed his testimony to admit that the Respondent maintains a practice of allowing employees to take a day off without pay when there is no work available. Tr. 722–723.

¹² The Respondent asserted that it previously laid off employees on the dirt side of the business, but conceded it had never laid off employees at the LaBelle plant. Tr. 425–426, 452, 759–760.

¹⁴ Make work included grounds maintenance, power washing or lubricating equipment, and clearing vegetation to make space for the disposal of additional fly ash. Tr. 388–395.

giving employees the day off, or sending them home early. 15 The relevant time period at issue here—the months of July and August—was no exception. For example, on July 21, the Respondent hired the Charging Party, Michael Gyrna (Gyrna), in anticipation of increased work from the Reliant plant. On July 22, the Respondent sent employees home early. On July 24, the Respondent reassigned J. Tyhonas from the main office to the LaBelle facility. On August 4, the Respondent reassigned Jack Holt, a driver, and Dean Robbins, a driver/mechanic, to work at another location. 16 On August 5, Kirich's diary entry reported a work force of 1 foreman and 12 workers at the LaBelle facility. Activities included unloading barges from the Hatfield and Reliant plants, hauling ash, and transporting to the dump. He also noted, "May start to cut back on workers." This was a reference to cutting back workers' hours or entire workdays. 17 On August 6. Kirich reassigned Dean Robbins to work as a mechanic. 18 On that date, employees were mostly "grubbing" and hauling dirt. 19 However, there was enough work for three drivers. 20 Even though the "work was relatively slow" at the time, employees were still putting in 35-40 hours per week.²¹ On August 7, the Respondent reassigned Matt Kent from the main office to the LaBelle plant, even though employees were mostly doing make work and the Respondent sent them home early.²²

B. Gyrna's Employment by the Respondent

20 Gyrna is a heavy equipment operator with 20 years of experience in construction. He possesses certifications to operate a crane and a forklift, and is qualified to operate excavators. bulldozers, and high lifts. Gyrna worked previously at the LaBelle site for Canastrale. He has been a member of the Union since 2001. Most recently, he worked for Trumbull on the Reliant fly ash contract until he was laid off in or around May 2003. Trumbull was a union contractor, competitor of the Respondent and handled the Reliant fly ash disposal work before the award of 25 the contract to Canastrale in mid-2003. On July 2, Union organizer Jay Hay (Hay) asked Gyrna to apply for employment at the Respondent's LaBelle facility and, if hired, to try to organize the Respondent's employees. The Union targeted the Respondent for an organizing campaign because it had assumed the work previously performed at the LaBelle facility by Trumbull, a 30 union contractor. Gyrna accepted the union assignment. For his efforts, the Union provided additional compensation in the form of a "salting fee" of \$200 and guaranteed continued compensation if he subsequently lost his job.²³

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¹⁵ Tr. 372, 548, 568, 723; R. Exh. 24.

¹⁶ Tr. 383–385.

¹⁷ Given the Respondent's concern about having an inadequate work force necessary to handle the increased work that might have materialized from the Reliant plant, it is clear that the Respondent did not plan to discharge employees. R. Exh. 23.

¹⁸ Tr. 520–521.

¹⁹ Tr. 164–165.

²⁰ Dean Robbins' brother, Fred Robbins, confirmed that "the work was slowing down," but noted there was enough work for three drivers. Tr. 537–538.

²¹ Douglas Arison also added that the Respondent's practice, when the work was slow, was to create work, such as facility and vehicle maintenance, or transfer them over to the dirt side of the business for a day or two. Tr. 565–566.

²² R. Exh. 24; Tr. 435, 440-441.

²³ Gyrna was serving the role of a "salt." Tr. 108, 110. "Salting" is a common union practice of sending union members to apply for employment with non-union companies and, once hired, to attempt to organize the employees. *Micrometl Corporation*, 333 NLRB 1133, 1134 (2001). As such, contrary to the Respondent's assertion, I do not find such union compensation unreasonable under the circumstances and any more indicative of bias that would exist in the case of a current employee called as a witness by the Respondent.

On July 2, Gyrna visited the LaBelle facility, met with Kirich, explained that he could operate an excavator, and completed an employment application. Notably, the application stated that Gyrna did not possess a commercial driver's license (CDL) and omitted any reference to prior employment with Trumbull.²⁴ On July 9, Kirich called Gyrna back for an interview and informed him that he would have a position available in several weeks. Kirich asked Gyrna whether he possessed a CDL and would be willing to drive a dump truck until a new dock was constructed. Gyrna told Kirich he was willing to drive a truck, but did not have a CDL. Kirich also told Gyrna that the Respondent would eventually be hiring more operators. He did not tell Gyrna anything about the possibility of layoff or transfer to another work location. Gyrna told Kirich that he was looking forward to hearing from Kirich about when to start working for the Respondent and the meeting ended.

On July 18, Kirich called Gyrna and asked him to come in and fill out personnel forms. Gyrna complied. He met with Kirich, filled out forms and received copies of company policies. None of the policies included a requirement that truckdrivers possess CDLs. Nor did Kirich mention that work had been slow. Kirich told Gyrna he would start work on July 21, but did not assign him to a specific position at that time.

Gyrna reported to work at the LaBelle facility on July 21. He met with Kirich, who assigned him to 2 days of training. On the first day, Gyrna observed coworkers offload fly ash from barges with an excavator and then transport the ash to a dump. On the second day, Gyrna was trained to drive a dump truck from the dock to the dump using the main two-lane road. Thereafter, Kirich assigned Gyrna to drive trucks, he pump and move barges, and operate a "Bobcat." During his 2-1/2 week tenure with the Respondent, Kirich either assigned Gyrna work the night before or at the beginning of the workday. At the end of each day, Gyrna wrote the work he performed onto his daily log. Kirich initialed the daily logs. Kirich considered Gyrna a "good hand" who "never refused anything." 28

C. Gyrna's Organizing Activities

Gyrna initiated organizational activity within 2–3 days after starting work for the Respondent. He informed coworkers of his relationship to the Union, gradually promoted the benefits of union representation, and sought to gain their support for unionization. Gyrna frequently reported his activities to Hay with a focus on arranging an organizational meeting between coworkers and union officials.

On August 4, Gyrna and nine coworkers met after work with Hay and two other union organizers, Joseph Beasley and Jeffrey Roscoe. The meeting was held at a Pizza Hut restaurant about 5 miles from the LaBelle facility. After successfully advocating the benefits of union membership, the union representatives distributed union authorization cards. All 10 of the

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²⁴ The Respondent contends that Gyrna lied on his application by omitting reference to his prior experience with Trumbull, listing another company—Kimmins—and providing an incorrect address for the latter. However, I find that Gyrna's failure to list Trumbull as a prior employer on his application was not unreasonable under the circumstances. It is common for "salts" to exclude references to prior employment by union contractors, since they fear that the nonunion contractor will not hire them if they do.

²⁵ There was no significant dispute as to what Gyrna's tasks were. Tr. 135–139.

²⁶ Tr. 190; GC Exh. 7.

²⁷ GC Exh. 7.

²⁸ Tr. 375, 772.

Respondent's employees in attendance signed the cards and returned them during the meeting. After collecting the authorization cards, the union representatives explained the alternative approaches to the next step in the representation process: presenting the authorization cards to the Respondent with a demand for voluntary recognition and bargaining or filing a representation petition for an election with the Board. The employees elected the first course of action and decided that the union representatives would present a demand for bargaining and copies of the signed authorization cards to Kirich at the LaBelle site during the morning of August 6, 2003.²⁹

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On August 5, Kirich told Gyrna that he would be driving a truck the following day. After arriving on August 6, Gyrna stood next to his vehicle in the parking area. At approximately 6:30 a.m., Hay and two other union organizers, Joseph Beasley and Jeff Roscoe, arrived in a van. Beasley and Hay got out, while Roscoe remained in the van. Gyrna and other employees briefly spoke with them before proceeding to their assigned jobs. Gyrna walked to his assigned truck, but the vehicle battery did not start and he went to the service garage for assistance. Beasley and Hay stayed in the parking area waiting for Kirich's arrival.³⁰

D. The Union's Bargaining Demand

Kirich arrived at approximately 6:50 a.m. Beasley and Hay immediately approached Kirich, introduced themselves, and attempted to present him with the Union's demand for recognition and authorization cards. Unbeknown to Kirich, Roscoe was videotaping the encounter from his vehicle approximately 40 yards away. Kirich refused to accept the documents. He told Beasley and Hay that he was also a member of the Union, instructed them to take the documents to the Respondent's Finleyville office, and demanded they leave the site. Kirich returned to his truck, drove a few feet before stopping and getting out of his vehicle again. At this point, the parties were standing about 2 feet apart. Kirich repeated his demand that the union representatives leave the area. Beasley responded by repeating his demand for union recognition, read the names of the employees who signed authorization cards, and asked Kirich if he recognized the names. Kirich acknowledged that he knew the persons mentioned and asked if all had signed cards. Beasley replied that they each signed.³¹ Beasley responded that

²⁹ It is insignificant whether the union organizers, as Arison testified, or the employees made the tactical decision to make a demand for bargaining. Tr. 555. There is no dispute that the employees agreed that the union representatives would present Kirich with copies of the signed authorization cards in order to protect them from retaliation. Tr. 37–38, 100–101, 146–147.

³⁰ The facts regarding Gyrna's truck assignment and the events prior to Kirich's arrival on August 6 are not in dispute. Tr. 148–153; 482–483.

³¹ The General Counsel's petition to revoke the Respondent's subpoena for production of the videotape was granted and the Respondent subsequently moved for an adverse inference over the failure to produce the videotape of the Kirich-Beasley confrontation. Tr. 10, 807. The General Counsel's petition was granted after it invoked the privilege in Board Rules, Sec. 102.118(a) and refused to give his consent to disclose the videotape. Rule 102.118 reflects the Board's longstanding policy of protecting employees from the reprisal and harassment inherent in labor litigation by exempting their statements from disclosure unless and until they are called to testify. This protection removes any chilling effect that would otherwise befall the Board's investigatory sources. *Smithfield Packing Co.*, 334 NLRB 34, 34–35 (2001), citing *NLRB v. Robbins Tire & Rubber Co.*, 447 U.S. 214, 240–241 (1978). However, the videotape was neither taken by, nor depicted, any of the Respondent's employees. Having considered the consequences flowing from the General Counsel's response—the withholding of useful evidence of the Kirich-Beasley confrontation—I find that the privilege must give way to the Respondent's right to obtain reasonably relevant information under Sec. 102.31(b) of the

he knew that Kirich and his sons were union members entitled to union pensions. He added that the Respondent's employees should be able to enjoy the same benefits that Kirich enjoys as a member of the Union. At that point, Kirich became angrier.³² Kirich insisted they leave. Beasley and Hay complied and left.³³ Later that day, the Union sent the Respondent a fax transmission requesting bargaining, copies of the authorization cards, and a Board representation petition,³⁴

E. Respondent's Response to the Union's Bargaining Demand

During the Kirich-Beasley confrontation, Gyrna was standing in the garage, next to his truck. Within 2 or 3 minutes after the union representatives left, Kirich walked directly into the garage and toward Gyrna. He was extremely agitated.³⁵ Kirich, who clearly learned about Gyrna's involvement with the Union sometime between the union meeting of August 4 and Kirich's confrontation with the union organizers,³⁶ decided at that point that he would lay off Gyrna.³⁷ He informed Gyrna that he would be laid off that day because there were too many

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Board's Rules. See Perdue Farms, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998). Based on the foregoing, and after further consideration of the testimony and posttrial submissions, the Respondent's motion is granted, and an inference is drawn that the videotape would not have supported the testimony of Beasley, Hay, and Gyrna that Beasley, during the initial confrontation, revealed Gyrna's role as a union organizer or the person who told the union officials about Kirich's union membership. See Gallup, Inc. and United Steelworkers of America, AFL-CIO, CIC, 2001 NLRB LEXIS 381, Part 2, *88-89 (2001) (exceptions pending).

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32 Kirich admittedly became angry with Beasley after he mentioned Kirich's union membership. Tr. 404. Employee Douglas Arison also heard from others in the shop that there had been an argument, that "they had presented him with the cards," Kirich "got upset about it," and "there was an exchange of words." Tr. 582-583.

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³³ The Respondent attempted to impeach Hay's credibility through Arison's testimony that Hay offered Arison \$1000 to testify on Gyrna's behalf during the investigation of the underlying charges. Tr. 565. Hay strenuously denied the charge. Tr. 795-796. I found Hay and Arison extremely guarded in their testimony on this issue. However, I found Arison more credible because his answers provided sufficient details of their conversations, while Hay merely denied the accusation. In any event, the issue is of no consequence. The essential facts of the Kirich-Beasley encounter, after drawing an adverse inference against the General Counsel, are not in dispute: Kirich became angry during the encounter with Beasley; Kirich became angry after Beasley made reference to Kirich's union membership; and Beasley told Kirich that all of the employees signed authorization cards and read their names. Tr. 402-403.

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³⁴ GC Exh. 2; Tr. 45.

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³⁵ Kirich was not credible regarding his confrontation with Gyrna. He denied that he was "screaming or mean" but conceded that he was "upset." Tr. 406. Gyrna's assessment of Kirich's state of mind, on the other hand, was consistent with the testimony provided by Dean Robbins, the mechanic who was working under a truck in the garage. Gyrna testified that Kirich was "very pissed off" and his "head was ready to explode," while Dean Robbins testified that he heard "bickering back and forth." Tr. 150-151, 520.

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³⁶ I infer knowledge on Kirich's part because of the timing of his action and the fact that the Respondent's work force is very small. Montgomery Ward & Co., 316 NLRB 1248, 1253 (1995).

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³⁷ Kirich's testimony that he decided to lay off Gyrna during the evening of August 5 was not credible. Kirich and Lawson both testified that Kirich first brought up the possibility of Gyrna's discharge at their meeting on August 2. At that time, Lawson told Kirich to hold off on any action until he spoke with Canastrale about additional work forthcoming from the Reliant plant. However, there is no proof that Kirich discussed the issue with Lawson at any time after their August 2 meeting. Furthermore, Kirich also conceded that there was no change in the level of

trucks.³⁸ Gyrna demanded his check and Kirich, in a clear reference to the Union, said to collect it from the "hall." Two other employees—Dean Robbins and Al Meisner—were present in the garage at this time.³⁹

Notwithstanding the fact that Kirich previously assigned Gyrna to drive a truck on August 6, he told Gyrna to count trucks carrying loads of fly ash.⁴⁰ This was not a legitimate function.⁴¹ Neither Gyrna nor any of the Respondent's other employees had ever been given such an assignment, as the Respondent was able to track the ash yield from each barge by requiring drivers to record on daily log sheets the number of trips from the barge to the landfill.⁴² Nevertheless, Gyrna complied and counted trucks.

At approximately, 9 a.m., Kirich called Lawson by telephone, informed him that the Union had been at the site, and added that he wanted to lay off Gyrna: "They are here. I want to lay him off." Lawson told Kirich to "hold tight," find work for Gyrna at the LaBelle site, and allow Lawson time to call the Respondent's attorney for advice. Nevertheless, Kirich was unable to let go of the union matter. At approximately 9:30 a.m., Kirich approached employee Douglas Arison and, referring to the organizing campaign, asked "when all this took place." Arison informed Kirich that Gyrna started the organizing process and got the employees to meet at the nearby Pizza Hut, where they signed the authorization cards. Kirich's inquiry continued to the point where he elicited information from Arison about Gyrna's role in the campaign: "I had informed him that Mike was the one that had brought the union in, yes." Kirich also sought to elicit the names of employees who signed authorization cards and Arison, referring to the authorization cards, informed him that "[e]verything is there." At approximately 1 and 1

work available at the LaBelle site between August 5 and 6. Tr. 385-386, 462.

³⁸ Kirich testified that he told Gyrna that "I might be laying you off today." Tr. 407. Gyrna, on the other hand, testified that Kirich told him he was "laid off." Tr. 151. Neither version was entirely correct. Kirich's version was too inconsistent with the emotional exchange that ensued, while Gyrna's version was inconsistent with one being laid off, but then being given an assignment. A logical construction of their credible testimony suggests that Kirich told Gyrna that he would be laid off that day. Gyrna then got angry and demanded his check.

- ³⁹ Gyrna referred to Dean "Robinson," but apparently meant Dean Robbins. Tr. 224.
- ⁴⁰ Kirich did not deny Gyrna's assertion that Kirich made him sit on a bucket. Tr. 153, 407.
- ⁴¹ Dean Robbins, a credible witness called by the Respondent, confirmed that the counting of trucks was not a legitimate function. Tr. 529.
 - ⁴² Tr. 153–155, 497, 627–628; GC Exh. 7.

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- ⁴³ The only logical interpretation of this statement is that Kirich wanted to fire Gyrna because of the Union's appearance at the facility. Tr. 729.
- ⁴⁴ Lawson testified that Kirich called him at approximately 9 a.m., while Kirich testified that he called Lawson between 10:30 and 11 a.m. Tr. 411, 625. I adopted both estimates because it is reasonable to believe that they spoke several times that morning. First, Kirich called Larson shortly after his Union encounter to warn Larson that he referred the organizers to the Finleyville office and to tell him that he wanted to lay off Gyrna. Second, it is reasonable to believe that Kirich called Lawson again that morning after getting more campaign information from Arison.
- ⁴⁵ As previously noted, Arison's testimony was extremely guarded. In this instance, his assertion that he volunteered all of the information to Kirich was far from credible. He initially testified that he responded to Kirich's inquiry by referring to the authorization cards: "Everything is there." However, he also informed Kirich that Gyrna initiated the organizing process with his coworkers—a piece of information not contained on individual authorization cards. Tr. 575–581; GC Exh. 2. In addition, Arison's quick response to the question strongly suggested that Kirich's further inquiry also took place at 9:30 a.m. Based on Arison's testimony, the General Counsel's motion to amend the complaint to allege an act of interrogation in violation of 8(a)(1) was

Immediately after speaking with Kirich, Lawson placed a telephone call to William Doepken, Esq. They spoke for approximately 15–20 minutes. During that conversation, Lawson told Doepken about the Union's appearance at the LaBelle facility and his desire to lay off Gyrna.⁴⁶ Lawson then drove to meet Doepken later that morning. In pertinent part, Lawson told Doepkin about the meeting that he had with Kirich on August 2.⁴⁷ He also informed Doepken about Gyrna's affiliation with the Union and that he was a "salt." Doepkin advised Lawson to do "business as usual," but strongly advised him to "find something for that man to do" or else Gyrna was likely "to have trouble with Local 66." The meeting lasted at least 2 hours and ended around 1 p.m.⁴⁸

In the meantime, Gyrna counted trucks for about 5 hours, until noon on August 6. At that point, Kirich approached Gyrna and told him he would not be laid off after all and that Lawson had work available for him elsewhere. Gyrna told Kirich he needed to arrange with his girlfriend to switch vehicles if he was going to be required to travel a significant distance. Kirich then directed Gyrna to go to the docks and count the number of trucks being loaded with fly ash.

Gyrna counted trucks from 1:30 until 2 p.m., when Kirich approached him, gave him Lawson's cellular telephone number, and told him to call Lawson around 4 p.m. Kirich told Gyrna to leave the worksite at that time, but advised him that he would be paid for a full day of

granted over the Respondent's objection. Tr. 699.

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⁴⁶ Lawson's testimony that he did not tell Doepken about Gyrna during that telephone conversation was not credible in light of his statement that he told Kirich to hold off firing Gyrna until he consulted a lawyer. Tr. 711–712.

⁴⁷ Kirich and Lawson each testified that they had their customary Saturday meeting on August 2. However, I did not find their testimony—that they discussed the termination or potential termination of Gyrna at that meeting—to be credible. Supposedly, Kirich told Lawson that he had too many drivers and should lay off Gyrna. Lawson did not make a decision and indicated that he needed to speak with Canastrale about the extent of future work before making a decision. Tr. 375–396, 620–623. Nevertheless, they subsequently testified that Kirich called Lawson during the morning of August 6, reported the incident with the union representatives and added that he intended to lay off Gyrna. Tr. 410, 625–626. Kirich was conveying his intention to lay off Gyrna—a power that Kirich did not have—when in fact Lawson had not spoken to Canastrale nor discussed it further with Kirich after August 2. Kirich further contradicted earlier testimony by stating that he decided to lay off Gyrna during the evening of August 5. Tr. 462. Nor was I persuaded by the entry in Kirich's diary purportedly substantiating the Respondent's contention that it intended to lay off Gyrna prior to August 6. The diary entry is not reliable. Supposedly, Kirich and Lawson met every Saturday. However, the August 2 entry is the only time that Kirich wrote about his discussions with Lawson on a Saturday.

⁴⁸ The Respondent took the unusual approach of sharing the attorney-client discussions between Lawson and counsel in an attempt to coat its subsequent actions with legitimacy. I found this testimony to be self-serving and a cynical attempt to convert the attorney-client privilege from a shield into a sword. In any event, neither Lawson nor Doepken provided a credible rendition of their meeting on August 6. Lawson testified that he informed Doepken about Gyrna's impending layoff of Gyrna, but denied telling him anything about Gyrna's union involvement. Even more incredible was the testimony of Doepken, an experienced labor attorney. Doepken, who allegedly kept no notes and whose recollection of the conversation was quite selective, testified that he never asked Lawson about Gyrna's connection to the Union. Yet, he advised Lawson to keep Gyrna working or risk problems with the Union. Such advice would not have issued in the absence of a perceived connection between Gyrna and the Union. Tr. 334-348, 630-633.

work.⁴⁹ At no time prior to leaving the LaBelle worksite on August 6 did Gyrna ever enter Kirich's office or use Kirich's office telephone in order to speak with Lawson.⁵⁰

After Gyrna left the LaBelle facility on August 6, he went home and arranged for transportation the next day. After consulting with Hay by telephone, Gyrna called Lawson at approximately 3:05 p.m.⁵¹ Lawson asked Gyrna about his experience with certain equipment, including a bulldozer, excavator with a laser, and a pan (dirt-carrying machine). Gyrna explained that he was qualified to operate a bulldozer on sloped terrain, had not operated a pan in some time, and had never operated an excavator with a laser. However, he also explained he simply needed to get "up to date" on the pan and was willing to learn how to operate the excavator. Lawson responded that he needed someone who could operate the pan immediately. Lawson told Gyrna that he had to consult with a foreman as to whether it was possible to use Gyrna to operate equipment on other worksites. Lawson told Gyrna he would get back to him.

Later that afternoon, Lawson contacted Gyrna by telephone. Lawson told Gyrna that it would cause too much confusion to move the men around at other worksites in order to arrange for Gyrna to work. Lawson also told Gyrna that the Respondent could not use him to operate the bulldozer because it was too muddy outside. Lawson then advised Gyrna to file a claim for unemployment compensation. At no time during their telephone conversations on August 6 did Lawson mention specific jobs that were available, their locations, or pay rates. Nor did Gyrna mention any transportation problems in getting to other locations.

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⁴⁹ This action was contrary to the Respondent's practice of paying employees only for time worked. Tr. 438, 723.

⁵⁰ The facts support Gyrna's contention that he never spoke to Lawson before leaving LaBelle on August 6. Tr. 157–158, 438. According to Lawson, he called Kirich after leaving Doepkin's office at about 1 p.m. At that time, he allegedly spoke to Gyrna in either Kirich's trailer or Canastrale's office. Tr. 631–633. That assertion was neither credible nor supported by telephone records. Gyrna's testimony, on the other hand, was credible and corroborated by his girlfriend's cellular telephone records. GC Exh. 8. He testified that Kirich approached him around 2 p.m. and gave him Lawson's cellular telephone number. Tr. 157–158, 438.

⁵¹ The Respondent failed to rebut Gyrna's corroborated testimony regarding the timing of the cellular telephone calls. GC Exh. 8; Tr. 159–160. Furthermore, Lawson could not recall whether it was he or Gyrna who initiated the call. Tr. 636–637.

⁵² The testimony of Gyrna and Lawson in this regard—that another foreman did not want Gyrna on his worksite because of the "extreme amount of trouble" the Respondent had experienced "with the soil" on the site—is fairly consistent. Tr. 160–163, 633–636. I found it very unlikely, however, based on the authority that Lawson purported to have over his business operations, that he would have tolerated resistance to a request for a job placement by any of his foremen.

⁵³ Lawson asserted that he offered Gyrna work at two locations—operating a high lift at West Allegheny Elementary School and operating a backhoe at the Mount Morris exit of Interstate Route 79—but Gyrna rejected them because they were too far to drive and said he was going to apply for unemployment benefits. Tr. 637–640. Gyrna, on the other hand, credibly denied even speaking with Lawson prior to leaving the site on August 6. Tr. 155–156, 159. In addition, Kirich corroborated Gyrna's contention that he did not have a transportation problem. Tr. 413. Finally, given the amount of effort put into this campaign by Gyrna and the Union, I credit the testimony of both Gyrna and Hay that Gyrna called Hay during the afternoon of August 6 and that Hay advised Gyrna to accept any work offered by Larson. Tr. 158, 240.

On or after August 6, Lawson did not offer Gyrna the opportunity to take time off without pay until work levels increased, as has been the Respondent's custom in the past.⁵⁴ Nor did the Respondent ever recall Gyrna for work at the LaBelle site or for any jobsites involved in the "dirt side" of the business. On the day following Gyrna's layoff, the Respondent used Matt Kent, an employee from the "dirt side," to drive the very truck that Gyrna had been driving.⁵⁵ The Respondent continued to experience fluctuations in business following Gyrna's layoff, without ever laying off another employee.⁵⁶ Indeed, Gyrna was the first and only employee ever laid off by the Respondent at the LaBelle facility.⁵⁷

E. Respondent's Threat to File Suit in Retaliation for the Gyrna Board Charge

On August 8, the Union filed an unfair labor practice charge with the Board's Region 6 office, alleging, inter alia, that the Respondent violated Section 8(a)(1) of the Act by terminating Gyrna because of his union activities. On August 16, Gyrna applied to the Commonwealth of Pennsylvania's Department of Labor and Industry, Bureau of Unemployment Compensation Benefits and Allowances (Unemployment Compensation Bureau) for unemployment compensation benefits. The Respondent opposed the application and, on September 5, the Unemployment Compensation Bureau denied Gyrna's claim. Gyrna appealed that determination and, on November 19, a hearing was held in Washington, Pennsylvania, before an Unemployment Compensation Bureau referee.⁵⁸ Gyrna was represented at the hearing by Jonathan Colton, Esq. The Respondent was represented by Binotto. Others present included Lawson, Kirich, Beasley, Roscoe, and Dan House, another LaBelle facility employee. Testimony during the hearing revealed that Roscoe videotaped the Kirich-Beasley encounter of August 6. Upon learning such information, Binotto accused the Union of committing a felony.

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After the hearing concluded, Binotto and Colton led the hearing participants out the door to the sidewalk area immediately outside the referee's office. Emotional tensions were running high. Nevertheless, Binotto and Colton maintained a professional approach to the litigation and engaged in a civil discussion. Colton mentioned that this had been his first trial. Binotto expressed surprise and complimented Colton on his performance. The two of them then walked to the left of the door, away from Gyrna and the other witnesses, and continued talking. Binotto informed Colton that Kirich retained an attorney to pursue civil or criminal charges over the wiretap issue. He asked Colton, "Isn't there some way we can get these matters settled" and

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⁵⁴ Lawson's testimony was contradictory and evasive on this point. He initially denied that the Respondent had a policy of giving employees time off without pay if there was no work. Lawson seemed to concede the point when confronted with Kirich's trial testimony to the contrary, but then asserted that Gyrna was not a full-time employee. However, after then conceding that the Respondent could not document such a status, Lawson then clung to the notion that Gyrna was in "his probationary period." This claim also proved false, as Lawson conceded that the Respondent had no such policy. Tr. 722–724, 727.

⁵⁵ Kirich's contention that Kent was brought in on August 7 to drive the truck because he had a CDL license was not credible, since non-CDL drivers operated the Respondent's trucks before and after August 6. Tr. 487–488.

⁵⁶ Kirich conceded this fact on cross-examination. Tr. 452.

⁵⁷ Fred Robbins, a credible witness called by the Respondent who claimed that Gyrna threatened him after August 6, confirmed that the Respondent never laid off employees during his tenure with the Company. Tr. 540–543.

⁵⁸ In her decision/order, issued December 3, referee Joyce Hawker denied Gyrna's appeal after determining that he refused suitable work elsewhere. The decision is devoid of any discussion of witness credibility. R. Exh. 8.

added that Kirich had retained a criminal attorney to pursue the videotape issue.⁵⁹ Simultaneously, an angry Beasley was involved in at least two confrontations. First, he approached Lawson and threatened costly litigation.⁶⁰ Then he confronted Kirich about 20 feet to the right of Binotto and Colton. Beasley was not in a position to overhear the Binotto-Colton conversation.⁶¹ Gryna and House were also standing to the right of the door and were located about 40 feet away from Binotto and Colton. As such, neither was in a position to overhear the attorneys' conversation.⁶²

III. DISCUSSION

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A. The Respondent's Treatment of Gyrna

The General Counsel asserts that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Gyrna on August 6 because (1) he supported the Union and (2) in order to discourage other employees from engaging in concerted activities. The Respondent contends that Gyrna voluntarily quit and was not terminated. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden of establishing that the employee engaged in concerted protected activity, the employer had knowledge of the employee's protected concerted activities, the employer took adverse action against the employee, and there is a connection between the protected concerted activities and the adverse action. Once the General Counsel establishes these elements, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory reason.

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⁵⁹ I found Binotto to be a credible witness and adopted his testimony regarding the proximity of other persons to him and Colton outside the hearing office. Binotto, an experienced labor attorney, was engaged in a personal conversation with Colton. This was clearly a situation where Binotto saw the wisdom of pulling aside his adversary in order to dispose of the Board's charges. Tr. 780–785. Colton had a vague recollection of the facts, but his testimony actually corroborated Binotto's version. He testified that Binotto approached him and threatened litigation over the videotape, but conceded that he asked Binotto about his performance when the latter approached him after the hearing. It was after their personal discussion that they discussed the videotape. Tr. 114–117. On further questioning, Colton could not recall where House was positioned, whether Binotto mentioned that Kirich had retained an attorney, or whether he initiated the sidewalk discussion with Binotto, or vice versa. Tr. 122–124.

⁶⁰ On this point, Lawson credibly testified that Beasley "got in his face, nose to nose" and threatened him. Beasley stated, "Get used to this. You are going to spend a lot of quality time and money with me." Tr. 670.

⁶¹ Beasley, who conceded he was still angry outside the hearing office, was obviously too busy arguing with Lawson and then Kirich to overhear the Binotto-Colton conversation. Tr. 105.
⁶² I do not credit the inconsistent testimony of Gyrna and union witnesses as to the relative

positions of the people outside the referee's office. Grnya testified that he was standing in the building doorway when he heard Binotto tell Beasley to drop the Board charges or face criminal charges over the videotape. Tr. 167. However, Binotto spoke to Colton, not Beasley, about the Board case. Furthermore Gyrna later conceded that he did not hear their discussion. Tr. 228–229. House, who credibly testified that Gyrna was standing near him smoking a cigarette, was also unable to hear the conversation. Tr. 512–513. Beasley testified that Gyrna was 3 or 4 feet behind him and House was nearby. Tr. 48–50. However, Roscoe testified that they were 15 feet away from Beasley and Binotto. Tr. 302. Roscoe also testified that he overheard Binotto tell Beasley to drop the case as they walked out of the hearing. Tr. 290–292. However, his testimony was also inconsistent with the testimony of Binotto, Colton, and Beasley that any discussions regarding the videotape took place between Binotto and Colton.

The facts establish the existence of all the factors of a *Wright Line* analysis. First, as the Union's "salt" or "point-man," Gyrna engaged in concerted activity soon after he was hired by promoting the benefits of union membership with coworkers. He apprised them of his role with the Union, succeeded in gathering them for an organizational meeting with union organizers on August 4, and signed a union authorization card at the meeting.

Second, the facts provide strong circumstantial evidence that the Respondent had prior knowledge of Gyrna's organizing activities. The timing of the Respondent's actions, the small size of the Respondent's operations at the LaBelle facility and the pretextual nature of the Respondent's reasons for discharging Gyrna all support a strong inference that the Respondent had prior knowledge. Kirich's statement to Gyrna on August 6 that he would be laid off was very close in time to the August 4 organizational meeting and immediately after the organizers confronted Kirich. The Respondent is a small company with a work force at LaBelle of less than 12 employees and it is extremely likely that Kirich learned about Gyrna's organizational activities from other employees at some point after that meeting. Montgomery Ward & Co., 316 NLRB 1248, 1253 (1995); Florida Cities Water Co., 247 NLRB 755, 756 (1990); Syracuse Dy-Dee Diaper Service, 251 NLRB 963 fn. 1 (1980). The Respondent also learned of Gyrna's involvement later that morning when Kirich interrogated Arison about the organizational effort and Arison revealed Gyrna's union connection. This interrogation took place prior to Lawson's actions later that day. Lastly, there was also strong circumstantial evidence that Lawson knew about Gyrna's union involvement when Doepken advised Lawson to keep Gyrna working or risk problems with the Union—an obvious hint that Lawson had briefed Doepken about Gyrna's role.

The third factor is whether the Respondent took adverse action against Gyrna. The General Counsel contends that Gyrna was permanently laid off, while the Respondent maintains that he voluntarily quit because he had problems with transportation and refused to accept alternative work elsewhere. The credible evidence suggests that the Respondent's agents, Kirich and Lawson, terminated Gyrna.⁶³ Kirich indicated his desire to lay off Gyrna in his initial telephone call to Lawson on August 6. Lawson then called his attorney for strategic advice. After his legal consultation, Lawson set on a course of removing Gyrna from the LaBelle worksite. Lawson spoke to Gyrna by telephone during the afternoon of August 6. He questioned Gyrna about his experience and said he would have to speak to his foremen at other jobsites about possible employment. When he realized that Gyrna did not have problems with transportation,⁶⁴ Lawson came up with a myriad of excuses—that his foremen did not want to be slowed down by someone who needed to be trained to operate a laser, that the soil was too muddy, or that it would be too confusing to rearrange work at other jobsites. Lawson then advised Gyrna to go collect unemployment compensation.⁶⁵

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⁶³ The Respondent admitted that Kirich and Lawson were supervisors within the meaning of Sec. 2(11) of the Act, but denied that they are agents within the meaning of Sec. 2(13) of the Act. It is well settled that a 2(11) supervisor is a 2(13) agent of that employer. *Williamette Industries, Inc.*, supra at 9 fn. 1. See also, *Excel DPM of Arkansas*, 324 NLRB 880 fn. 2 (1997).

⁶⁴ Lawson's contention that Gyrna had a transportation problem getting to another location was meritless. Gyrna credibly denied that assertion and explained that he needed to switch vehicles with his girlfriend. Kirich corroborated Gyrna's version by recalling Gyrna's reassurance that there was no problem and that he simply needed to make arrangements. Tr. 413, 415.

⁶⁵ Lawson's contention—that work was available at the West Allegheny and Mount Morris jobsites, and Gyrna declined such work—was not credible. Lawson provide the details of alleged conversations with foremen that declined his request to place Gyrna on their projects, but provided no details about his alleged conversations with the foremen on the projects that were made available to Gyrna. Tr. 636–637. Gyrna, on the other hand, credibly testified that

The Respondent urges reliance on the findings of the unemployment compensation hearing referee for the proposition that Gyrna quit his job. I received in evidence the referee's decision/order and consider the information contained therein as useful background. However, as the General Counsel notes, citing *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561 fn. 7 (1979), the Board has held that in resolving credibility disputes, it is not proper to look to, or base a decision upon, a different administrative law judge's decision in another proceeding. In this instance, the referee's decision relied upon by the Respondent does not even address the credibility of the witnesses who testified in that proceeding.

The fourth factor is whether Gyrna's discharge was due to antiunion animus on the part of the Respondent. There were several instances constituting direct evidence of the Respondent's union animus. The first was Kirich's remark to Gyrna that he should go to collect his paycheck at the Union "hall." Another instance was revealed by Kirich's telephone call to Lawson on August 6 telling him that the Union had been there and that he wanted to lay off Gyrna. Yet another was the extreme anger that Kirich admittedly developed after Beasley and Hay presented him with the bargaining demand. Kirich got angry and demanded the union representatives leave. The Respondent's counsel attempted to downplay Kirich's conduct by suggesting that Kirich purportedly needed to raise his voice to overcome a speech disability. From listening to Kirich as he testified, however, I did not detect such an impediment, much less one that would account for the foul language uttered at the time.

In addition, the record as a whole supports an inference of discriminatory motivation. *Tabular Corp. of America*, 337 NLRB 99 (2001); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Pete's Pic-Pac Supermarkets*, 707 F.2d 236, 240 (6th Cir. 1983). The strongest piece of circumstantial evidence was the timing of the Respondent's actions. *Hewlett Packard Co.*, 341 NLRB No. 62, slip op. at 12 (2004). Lawson allegedly decided to lay off Gyrna a week earlier, while Kirich testified that he made the decision the evening of August 5. Neither took such action, however, until shortly after the Union showed up on August 6.

There is also ample evidence of Gyrna's disparate treatment. The Respondent admittedly treated Gyrna differently by assigning him to count trucks, a meaningless task that Kirich had never given to any employee. The Respondent also treated Gyrna differently by allowing him to leave early on August 6, but paying him for the entire day. This action was not consistent with the Respondent's practice of paying employees only for time worked. It was, however, a strong indication that the Respondent wanted to prevent Gyrna from continuing his efforts on behalf of the Union by removing him from the LaBelle site as quickly as possible. Finally, the Respondent treated Gyrna differently by failing to offer him "make work," the opportunity to take time off without pay or assign him to work at other locations. This action was not consistent with the historical practice of the Respondent, whose business fluctuations have never been met by layoffs.

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have discharged Gyrna even in the absence of his union activity. *Monroe Mfg.*, 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

The Respondent contends that, in any event, it would have discharged Gyrna on August 6 because there was not enough work. However, none of the explanations offered were credible. The Respondent introduced company records to show that anticipated tonnage from the Reliant plant never materialized, but failed to distinguish such a development from the historical fluctuations that affected its business and were never addressed by layoffs. Lawson and Kirich allegedly discussed Gyrna's discharge on August 2, but Lawson decided to hold off until he spoke with Canastrale. There is no evidence, however, that Lawson ever consulted with Canastrale after August 2. Nor is there any evidence that Kirich consulted with Lawson before informing Gyrna on August 6 that he might lay him off. Kirich subsequently testified that he decided on August 5 that he was going to lay off Gyrna the next day, even though there was no change "overnight in the workload," he had already assigned Gyrna work for August 6, and he had not spoken with Lawson. Kirich also asserted that he and Lawson decided to lay off Gyrna because he was the last hired, yet the Respondent did not maintain a seniority policy. The Respondent focused on Gyrna's failure to possess a CDL as a basis for not keeping him. Yet, Kirich knew that he did not have a CDL when he hired him, and then used Gyrna and other non-CDL drivers (Kudyba and Arison) to drive trucks—before and after the August 2 meeting in which Lawson allegedly expressed his concern about the use of non-CDL drivers.

Based on the foregoing, I find that the Respondent failed to meet its burden of proving that Gyrna would have been terminated even in the absence of his advocacy for the Union. The reasons asserted by the Respondent were not relied upon and were a pretext for its real reason—punishing Gyrna for engaging in protected concerted activity.

B. Kirich's Conversation with Arison

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The General Counsel further alleges that the Respondent violated Section 8(a)(1) when Kirich interrogated Arison about the organizing campaign. The Respondent contends that Kirich's inquiry did not constitute actionable interrogation because the conversation took place in a moving truck, Kirich was only a foreman, and the information sought was "relatively mundane" and "did not seek the union sympathy of any employee." The Respondent also renewed and briefed its contention that the General Counsel's trial motion to amend the complaint is time barred pursuant to Section 10(b) of the Act.

Section 8(a)(1) makes it unlawful for an employer to interrogate employees about their union activities in such a way that it tends to coerce them in the exercise of their Section 7 rights. *Kona 60 Minute Photo*, 277 NLRB 867 (1985). It is undisputed that Kirich, a short time after the union organizers left the LaBelle facility on August 6, asked Arison "when all this took place." Kirich's inquiry clearly continued to the point where he elicited information from Arison about Gyrna's role in the campaign: "Mike was the one that had brought the union in, yes." Kirich also sought to elicit the names of employees who signed authorization cards and Arison, referring to the authorization cards, informed him that "[e]verything is there." In light of the surrounding circumstances—the pendency of an organizing campaign, and Kirich's adverse action against Gyrna earlier that morning—Kirich's questions as to those employees who signed authorization cards and the employee who initiated the campaign constituted coercive interrogation in violation of Section 8(a)(1). See *Bristol Nursing Home*, 338 NLRB 737, 738–739 (2002); *Shamrock Foods Co.*, 337 NLRB 915, 918 (2002).

The Respondent correctly argues that the General Counsel's trial amendment charging illegal interrogation by Kirich was not filed within the requisite period under the Act. Section 10(b) states, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The complaint may be amended, however, if the untimely allegations are closely related to the

violations contained in the timely charge and occurred within 6 months before the filing of the charge. *Redd-I, Inc.*, 290 NLRB 1115, 1115–1116 (1988), citing *NLRB Dinion Coil*, 201 F.2d 484, 491 (2d Cir. 1952). Untimely charges are closely related if they involve the same legal theory as the timely allegations, arise from the same factual circumstances or sequence of events, and would likely evoke similar defenses. *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

The allegation that Kirich coercively interrogated Arison on August 6 is "closely related" to the charge in Case 6–CA–33928, timely filed on August 8, that the Respondent violated Section 8(a)(1) and (3) by discharging Gyrna on August 6 in retaliation for his union support. The new charge that Kirich coercively interrogated Arison involves the same legal theory and factual circumstances—that Kirich reacted in a retaliatory manner in response to the Union's organizing campaign. The allegation that Kirich conducted a coercive interrogation of Arison was simply another in a sequence of events involving Kirich's responses to his confrontation with Beasley and Hay on August 6. First he told Gyrna that he was going to be laid off. Then he told him to sit on a bucket and count passing trucks. Shortly thereafter, he interrogated Arison about employee involvement in the organizing campaign. The defenses to the new allegations are the same—that Kirich was conducting business as usual, was not motivated by antiunion animus and did not retaliate against Gyrna because of his union activities. Accordingly, the complaint was properly amended at trial to assert the additional interrogation charge.

C. Binotto's Remarks Regarding the Videotape

The General Counsel further alleges that the Respondent, by its agent, Binotto, violated Section 8(a)(1) on November 19 by threatening to file criminal charges against the Union and its representatives in retaliation for the Union's filing of unfair labor practice charges on behalf of Gyrna. The Respondent contends that Binotto directed his remark to nonemployees outside the presence of employees. It also asserts that Binotto's statement was not a threat, but rather, a settlement-related overture.

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The test for determining whether an employer's conduct violates Section 8(a)(1) is whether the employer engaged in conduct that, it may be reasonably said, tends to interfere with the free exercise if employee rights under the Act. American Freightways Co., 124 NLRB 146, 147 (1959). A finding that an employer interfered with such rights by coercing employees does not depend on an employer's motive or on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct reasonably tends to interfere with the free exercise of employee rights under the Act. Wis-Pack Foods, Inc., 319 NLRB 933, 937 (1995), enfd. 125 F.3d 518 (7th Cir. 1997); Waco, Inc., 273 NLRB 746, 748 (1984). Employees include persons, such as Gyrna, who have become former employees as a result of an unfair labor practice. Nissen Foods (USA) Co., 272 NLRB 371, 380 (1984); Little Rock Crate & Basket Co., 227 NLRB 1406 (1977). Furthermore, as the Respondent's attorney in both the unemployment compensation hearing and the unfair labor practice proceeding, Binotto clearly had apparent authority to act as the Respondent's agent in communicating the Respondent's responses to the Union's continued litigation of the unfair labor practice charges. Nevada Security Innovations, Ltd., 341 NLRB No. 126, slip op. at 4 (2004), citing Alleghany Aggregates, 311 NLRB 1165 (1993); and Dentech Corp., 294 NLRB 924 (1989).

As previously discussed, Binotto's statements were not overheard by either Gyrna or House. As the hearing ended, Binotto and Colton met outside the hearing office and engaged in conversation. Colton initiated the conversation by asking how he performed in his first trial. Binotto complimented him as they walked away from the others. Binotto then mentioned that Kirich would take legal action regarding the videotape if the unfair labor practice charges were

not dropped. The testimony was widely divergent as to the positions of those persons congregating outside the hearing office. A credible interpretation of the evidence strongly suggests, however, that the two employees present during the conversation, Gyrna and House, were too far away to hear Binotto's comments. Furthermore, it is clear that Beasley also was unable to hear their conversation because he was too busy arguing with Lawson and Kirich.

Assuming, arguendo, that either Gyrna or House overheard Binotto's threat. his statement did not constitute a violation of Section 8(a)(1). It is true that FRE 408 does not shield a charge based upon an unfair labor practice, such as a threat, simply because it was committed in the course of settlement discussions. Uforma/Shelby Business Forms v. NLRB. 155 LRRM 2001, 2008 (1997); Miami System Corp., 320 NLRB 71 fn. 2 (1995), affd. in relevant part 111 F.3d 1284, 1293-1294 (6th Cir. 1997). Binotto's threat, however, was not unlawful for several reasons. First, Binotto threatened to initiate suit in order to address what he reasonably believed was a violation of the Federal Wiretap Act. 18 USC §2520. As the Supreme Court recently held in BE & K Construction Co. v. NLRB, 536 U.S. 516, 535-537 (2002), the Board may not declare unlawful a retaliatory suit that is based on an employer's reasonable belief of illegality. Secondly, Binotto threatened to initiate legal action against union officials—not employees—relating to the videotaping. Moreover, the retaliatory action threatened—legal action against the Union relating to the videotaping—was not premised on employee activity protected by the Act. Access Control Systems, 270 NLRB 823, 825-826 (1984). Binotto's threat was, therefore, distinguishable from the threat of the employer in Miami Systems Corp. to eliminate a third shift of work if the grievance was pursued. 320 NLRB at 76. While it is true that Gyrna's rights would have been affected if the Union capitulated to the threat by dropping the charges, it is pure speculation that union officials would have chosen such a course of action to the detriment of Gyrna' rights under the Act. Indeed, as far as his unfair labor practice charge was concerned, Gyrna had no reason to be concerned about the existence of a videotape, as the tape recordings of employer actions or statements have been sanctioned as admissible evidence by the Board. Williamhouse of California, Inc., 317 NLRB 699, 699 fn. 1 (1995): McAllister Bros., 278 NLRB 601, 601 fn. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987).

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CONCLUSIONS OF LAW

1. Richard Lawson Excavating, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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- 2. The International Union of Operating Engineers, Local Union No. 66, 66A, B, C, D, O & R, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging Michael Gyrna due to his support for the Union, the Respondent violated Section 8(a)(3) and (1).
 - 4. By interrogating Douglas Arison about the names of employees who signed authorization cards and the roles of individual employees in the organizing campaign, the Respondent violated Section 8(a)(1).

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5. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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Having found that the Respondent has engaged in the above violations of the Act, it shall be recommended that the Respondent cease and desist from such actions and take such

affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notices. It is recommended that the Respondent offer immediate reinstatement to employee Michael Gyrna, who was unlawfully discharged. He shall be reinstated to his prior position or to a substantially equivalent one if his prior position no longer exists. Gyrna shall be made whole for all loss of backpay and benefits sustained by him as a result of the Respondent's unfair labor practices. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, the Respondent must remove from any of its records all reference to Gyrna's discharge and notify him in writing that such action has been taken and that any evidence related to that termination will not be considered in any future personnel action affecting him. Sterling Sugars, 261 NLRB 472 (1982).

Finally, the Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 66

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ORDER

The Respondent, Richard Lawson Excavating, Inc., LaBelle, Pennsylvania, its officers, agents, successors and assigns, shall

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1. Cease and desist from

- (a) Interrogating employees regarding their union activities by asking them for the names of employees who signed authorization cards or information regarding the roles of individual employees in the organizing campaign.
- (b) Discharging or otherwise discriminating against any employees for engaging in activities protected by Section 7 of the Act.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative actions necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Michael Gyrna full reinstatement to his former job, discharging, if necessary, any replacement employee in order to return him to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Michael Gyrna whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge in August 2003 in the manner set forth in the remedy section of the decision in this case.

⁶⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to Michael Gyrna's discharge on August 6, 2003, and, within 3 days thereafter, notify him in writing that this has been done and that this unlawful conduct will not be used against him in any way. (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. (e) Within 14 days after service by the Region, post at its LaBelle, Pennsylvania facility copies of the attached notice marked "Appendix."67 Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 2003. (f) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. IT IS FURTHER ORDERED that the complaint allegations found to lack proof or found otherwise not to have violated the Act be, and the same hereby are, dismissed. Dated, Washington, D.C. February 11, 2005 Michael A. Rosas Administrative Law Judge

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⁶⁷ If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relation Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local Union No. 66, 66A, B, C, D, O & R, AFL–CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Michael Gyrna full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Gyrna whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Michael Gyrna, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

		EXCAVATING, INC		
		(Employer)		
Dated	By			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 1501 Pittsburgh, Pennsylvania 15222-4173

Hours: 8:30 a.m. to 5 p.m. 412-395-4400.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.